Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C(ARB)-23–08 OF 2016
AZIZAH NAWAWI J
27 APRIL 2018

Arbitration — Award — Question of law — Parties entered into contract — Disputes arose — Matter brought to arbitration — Whether arbitrator made errors in arbitral award — Whether issue involved question of law — Whether there were merits in application — Arbitration Act 2005 s 42

This was a dispute between the plaintiff as the claimant and the defendant as the respondent in the arbitration proceedings related to the construction of an expressway of about 184 KM in the East Coast of Malaysia from Jabor, Kemaman to Kampung Gemuruh, Kuala Terengganu known as Lebuhraya Pantai Timur 2 ('the LPT 2'). The plaintiff successfully tendered for and was awarded Projek Lebuhraya Pantai Timur Fasa 2, Pakej 3, dari CH 26,100 (Ladang Ketengah Perwira) ke CH 40,038 (Stesen Penyelidikan Mardi), Daerah Kemaman, Terengganu Darul Iman ('the project') by the defendant. The contract period was for 130 weeks commencing from 16 June 2007–1 December 2009. The parties entered into formal written contract but dispute arose between the parties due to the increase in the cost of construction to carry put the works. The plaintiff requested the defendant to provide the necessary assistance caused by the increased costs of construction via letters but the defendant did not respond to these letters. Subsequently, the plaintiff and the defendant had entered into a supplementary agreement on 1 November 2008 to include for six more items under a circular known as *Surat Pekeliling Perbendaharaan Bil 3 Tahun 2008* ('the SPP 3/2008'). Two extensions of time ('EOT') were granted to the plaintiff totalling of 15 months of extension whereby the completion date was extended from 1 December 2009–11 March 2011. Despite entering the supplementary agreement and being given two EOTs, the plaintiff's progress was still slow and eventually the plaintiff had suspended the works from 28 October 2009. Thus, the defendant had determined the contract with the plaintiff. The plaintiff's stand was that its suspension of the works was with reasonable basis and therefore commences arbitration proceedings against the defendant. The arbitrator handed down the award dated 15 July 2016 and hence the plaintiff sought the orders in the originating summons: (a) that the questions contained in Annexure A to be decided by the court; and/or (b) that the final award dated 15 July 2016 be set aside or varied or remitted to the learned arbitrator for consideration except for paras 16.3, 16.4, 50–66.11, 74.1–77.2 and part of para 8(1) wherein the

A defendant's counterclaim was dismissed; and (c) the costs of and incidental to this application be borne by the defendant to the plaintiff.

Held, dismissing the application with costs:

B (1) The plaintiff did not show how it was entitled to the proceeds of the performance bond but merely submitted that just because the respondent failed in its counterclaim for damages, then it was also not entitled to the performance bond. The arbitrator had given his reasons as to why the utilisation of the performance bond was not wrongful and C thus, his findings should not be disturbed. No error of law in the interpretation and the findings of the learned arbitrator were found. The plaintiff was not entitled to damages as the plaintiff had failed to establish that the defendant had breached the contract on the pleaded grounds and the plaintiff had also abandoned the site before the termination of the D contract (see paras 51, 54, 56 & 59).

(2) The learned arbitrator did not impose any liquidated and ascertained damages ('LAD') on the plaintiff. The reference to LAD in determining the utilisation of the performance bond did not mean that the arbitrator had imposed LAD on the plaintiff, but had merely provided a E comparison to show that if the defendant did claim for LAD, the amount due to the defendant will be more than the amount of the performance bond. Therefore, this question did not arise from the award (see paras 61–62).

F (3) What was the appropriate measure of damages was a finding of facts made by the arbitrator and not a question of law. In addition, the arbitrator's findings that the plaintiff did not have any reasonable reasons for suspending the works at site and the losses alleged to be suffered by the plaintiff could not be attributed by any acts and/or omissions of the G defendant were findings of facts and should not be disturbed (see paras 64–66).

(4) The findings where there was no evidence to support the plaintiff's allegation that its suspension of work was for reasonable causes were all findings of facts which the court would not disturb (see paras 69).

H (5) The learned arbitrator had considered the plaintiff's position based on the witness testimony and the fact pleaded in the points of claim as to the cost over-run suffered by the plaintiff. These were findings of facts by the arbitrator which were not questions of law (see para 75).

I (6) The finding where there was no basis for the plaintiff to say that it was led to believe that it had a legitimate expectation that the contract price would be increased were findings of fact which could not be disturbed, and with these finding of facts there was no basis to invoke the doctrine of estoppel and/or legitimate expectation (see para 76).

(7) The plaintiff's complaint was primarily based a finding of fact by the arbitrator. The learned arbitrator had carefully evaluated the evidence and applied the correct principles of law in his findings. As such, there were no questions of law that required the intervention of court under s 42 of the Arbitration Act 2005 (see para 79).

[Bahasa Malaysia summary

Ini adalah pertikaian di antara plaintif sebagai pihak yang menuntut dan defendan sebagai responden dalam prosiding timbang tara berkaitan dengan pembinaan lebuhraya sekitar 184 KM di Pantai Timur Malaysia dari Jabor, Kemaman ke Kampung Gemuruh, Kuala Terengganu yang dikenali sebagai Lebuhraya Pantai Timur 2 ('LPT 2'). Plaintif telah berjaya menender dan telah diberikan Projek Lebuhraya Pantai Timur Fasa 2, Pakej 3, dari CH 26,100 (Ladang Ketengah Perwira) ke CH 40,038 (Stesen Penyelidikan Mardi), Daerah Kemaman, Terengganu Darul Iman ('projek') oleh defendan. Tempoh kontrak adalah selama 130 minggu bermula dari 16 Jun 2007–1 Disember 2009. Pihak-pihak menandatangani kontrak bertulis formal tetapi pertikaian telah timbul antara pihak-pihak yang disebabkan oleh peningkatan kos pembinaan untuk melaksanakan kerja-kerja tersebut. Plaintif meminta defendan untuk memberikan bantuan yang diperlukan disebabkan peningkatan kos pembinaan melalui surat-surat tetapi defendan tidak membalas surat-surat tersebut. Selepas itu, plaintif dan defendan menandatangani perjanjian tambahan pada 1 November 2008 untuk memasukkan enam lagi item di bawah pekeliling yang dikenali sebagai Surat Pekeliling Perbendaharaan Bil 3 Tahun 2008 ('SPP 3/2008'). Dua pelanjutan masa ('EOT') telah diberikan kepada plaintif berjumlah 15 bulan pelanjutan di mana tarikh penyiapan telah dilanjutkan dari 1 Disember 2009–11 Mac 2011. Walaupun perjanjian tambahan ditandatangani dan diberi dua EOT, kemajuan plaintif masih lambat dan akhirnya plaintif telah menggantung kerja-kerja dari 28 Oktober 2009. Oleh itu, defendan telah membatalkan kontrak dengan plaintif. Pendirian plaintif adalah bahawa penggantungan kerja itu adalah dengan dasar yang munasabah dan oleh itu memulakan prosiding penimbangtaraan terhadap defendan. Penimbang tara memberi award bertarikh 15 Julai 2016 dan dengan itu plaintif memohon perintah dalam saman pemula: (a) bahawa soalan-soalan yang terkandung dalam Lampiran A untuk diputuskan oleh mahkamah; dan/atau (b) bahawa award muktamad bertarikh 15 Julai 2016 diketepikan atau diubah atau dibatalkan penimbang tara yang bijaksana untuk pertimbangan kecuali perenggan 16.3, 16.4, 50–66.11, 74.1–77.2 dan sebahagian perenggan 8(1) di mana tuntutan balas defendan ditolak; dan (c) kos dan kos sampingan kepada permohonan ini ditanggung oleh defendan kepada plaintif.

Diputuskan, menolak permohonan dengan kos:

(1) Plaintif tidak menunjukkan bagaimana mereka berhak kepada hasil bon

perlaksanaan tetapi hanya menyatakan bahawa kerana responden gagal dalam tuntutan balas untuk ganti rugi, maka mereka juga tidak berhak pada bon perlaksanaan. Penimbang tara telah memberikan alasan-alasan mengapa penggunaan bon perlaksanaan adalah tidak menyalahi undang-undang dan oleh itu, keputusan beliau tidak sepatutnya diganggu. Tiada kesilapan undang-undang dalam tafsiran dan keputusan oleh penimbang tara telah ditemui. Plaintif tidak berhak untuk ganti rugi kerana plaintif telah gagal untuk membuktikan bahawa defendan telah melanggar kontrak atas alasan yang dipohon dan plaintif telah meninggalkan tapak sebelum penamatan kontrak (lihat perenggan 51, 54, 56 & 59).

(2) Penimbang tara yang bijaksana tidak mengenakan apa-apa ganti rugi likuidasi ('LAD') terhadap plaintif. Rujukan pada LAD dalam menentukan penggunaan bon perlaksanaan tidak bermakna bahawa penimbang tara telah mengenakan LAD terhadap plaintif, tetapi hanya memberikan perbandingan untuk menunjukkan bahawa jika defendan menuntut LAD, jumlah yang perlu dibayar kepada defendan akan menjadi lebih daripada jumlah bon perlaksanaan. Oleh itu, persoalan ini tidak timbul daripada award (lihat perenggan 61–62).

(3) Apakah ukuran ganti rugi yang sesuai adalah satu dapatan fakta yang dibuat oleh penimbang tara dan bukan persoalan undang-undang. Di samping itu, dapatan penimbang tara bahawa plaintif tidak mempunyai apa-apa sebab yang munasabah untuk menggantung kerja-kerja di tapak dan kerugian yang dikatakan dihadapi oleh plaintif tidak boleh dikaitkan dengan apa-apa perbuatan dan/atau kelalaian oleh defendan adalah dapatan fakta dan tidak sepatutnya diganggu (lihat perenggan 64–66).

(4) Dapatan di mana tiada bukti untuk menyokong dakwaan plaintif bahawa penggantungan kerja adalah kerana sebab-sebab munasabah adalah dapatan fakta yang mana mahkamah tidak akan ganggu (lihat perenggan 69).

(5) Penimbang tara telah mempertimbangkan kedudukan plaintif berdasarkan testimoni saksi dan fakta yang diplidkan dalam alasan tuntutan tentang lebihan kos yang ditanggung plaintif. Ini adalah dapatan fakta oleh penimbang tara yang merupakan bukan persoalan undang-undang (lihat perenggan 75).

(6) Dapatan di mana tidak terdapat asas bagi plaintif untuk menyatakan bahawa mereka telah didorong untuk mempercayai bahawa mereka mempunyai jangkaan sah bahawa harga kontrak akan meningkat adalah dapatan fakta yang tidak boleh diganggu, dan dengan dapatan fakta ini tiada asas untuk memohon doktrin estopel dan/atau jangkaan sah (lihat perenggan 76).

(7) Aduan plaintif adalah berdasarkan dapatan fakta oleh penimbang tara.

Penimbang tara telah dengan teliti menilai keterangan dan menggunakan prinsip undang-undang yang betul dalam dapatan beliau. Oleh itu, tiada persoalan undang-undang yang memerlukan campur tangan mahkamah di bawah s 42 Akta Timbang Tara 2005 (lihat perenggan 79).]

Notes

For cases on question of law, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1967–1972.

Cases referred to

Chain Cycle Sdn Bhd v Kerajaan Malaysia [2016] 1 MLJ 681, CA (refd)
Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (folld)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)
Sababumi (Sandakan Sdn Bhd) v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)
Tai Wah Construction Co v Government Of Malaysia (Jabatan Kerja Raya Sarawak) [2005] 2 MLJ 442; [2004] 3 CLJ 489, CA (refd)
Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu) [2011] 2 MLJ 400, HC (refd)

Legislation referred to

Arbitration Act 2005 s 42, 42(1), (1A), (2), (4)
Contracts Act 1950 s 54

K Gobinath (Adam Lee with him) (Mohanadass Partnership) for the plaintiff.
Rafidah Che Aziz (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Azizah Nawawi J:

APPLICATION

[1] In the originating summon, the plaintiff is seeking the following orders;

(a) that the questions contained in Annexure A to be decided by this court; and/or

(b) that the final award dated 15 July 2016 be set aside or varied or remitted to the learned arbitrator for consideration except for paras 16.3, 16.4, 50–66.11, 74.1–77.2 and part of para 8(1) wherein the defendant's counterclaim was dismissed; and

(c) the costs of and incidental to this application be borne by the defendant to the plaintiff.

[2] The questions of law in Annexure A which the plaintiff seeks this court to adjudicate are as follows:

(i) whether as a matter of law given that the termination was wrongful can the defendant retains the performance bond amount, refuse to compensate the plaintiff for work done and/or make payment for loss of profit?

(ii) whether as a matter of law the arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no certificate of non-completion issued?

(iii) as a matter of law, what should be the measure of damages as a result of the wrongful termination of the agreement dated 16 November 2017 by the defendant?

(iv) whether the defendant is liable to compensate the plaintiff pursuant to s 54 of the Contracts Act 1950 for losses sustained by the plaintiff due to difficulties and hardship in the performance caused by the acts or circumstances created by the defendant?

(v) whether, in law, the defendant is liable to compensate the plaintiff for cost escalation resulting from or due to statutory and/or regulatory implementation or government announcements that were not foreseeable by the plaintiff at the date of the tender?

(vi) whether the doctrine of sanctity of contract is so rigid to the extent that implied terms can no longer be invoked even in a situation where the term is obviously necessary to achieve the intention of the contract of when the terms were necessary to give business efficacy to the transaction or objective of the contract?

(vii) whether as a matter of law the arbitrator can reject the application of implied terms to a contract?

(viii) whether as a matter of law can an arbitrator decide an issue by making reference to laws of foreign jurisdiction such as 'French laws that was adopted by the European Courts'?

(ix) whether it is proper as a matter of law for an arbitrator to reach a conclusion based on assumptions?

(x) whether the basis applied by the arbitrator is an acceptable method of assessing the measure of damages?

(xi) whether as a matter of law the plaintiff is entitled to rely on either the doctrine of estoppel and/or legitimate expectation as a result of the conduct and representations made by the defendant?

(xii) whether as a matter of law, a sole arbitrator is entitled to consider and take into account facts favourable to one party and ignore facts favouring the opposing party? and

(xiii) whether in a reasoned award the arbitrator may decide part of the issues and/or claims without fully addressing and assigning reasons thereto?

[3] Having considered the application and the submission of the parties, this court find no merits in the application and the same was dismissed with costs.

THE SALIENT FACTS

[4] The plaintiff was the claimant while the defendant was the respondent in the arbitration proceedings. The dispute between the parties relates to the construction of an expressway of about 184 KM in the East Coast of Malaysia from Jabor, Kemaman to Kampung Gemuruh, Kuala Terengganu known as Lebuhraya Pantai Timur 2 ('the LPT 2').

[5] The LPT 2 was undertaken by the Malaysian Highway Authority ('the LLM') and the defendant. LLM was to oversee the construction of the highway from Bukit Besi to Telemung while the defendant was to carry out the remaining works. The defendant's portion of the expressway was divided into 16 packages, whereby the construction works was to be contracted out as packages one to 16.

[6] The plaintiff successfully tendered for and was awarded one of the 16 packages, namely package 3, which is known as 'Projek Lebuhraya Pantai Timur Fasa 2, Pakej 3, dari CH 26,100 (Ladang Ketengah Perwira) ke CH 40,038 (Stesen Penyelidikan Mardi), Daerah Kemaman, Terengganu Darul Iman' ('the project') on 28 May 2007. The value of the contract was approximately RM169m and the contract period was for 130 weeks commencing from 16 June 2007–1 December 2009.

[7] Subsequently, the parties entered into formal written contract based on JKR standard form contract ('the contract'). The terms and conditions of the main contract were not subjected to negotiations. It is also provided in cl 53 of the conditions of contract that five items will be subject to a price fluctuation mechanism, namely cement, steel, automotive gas (diesoline), fuel oil (light and medium) and bitumen.

[8] Subsequently, dispute arose between the parties due to the increase in the

A cost of construction to carry out the works. As a result, there were several meetings held between the defendant and plaintiff together with other contractors involved in the project. In a meeting dated 6 December 2007, the plaintiff claimed that the defendant had agreed to assist the plaintiff and the other contractors to secure more funds for each contractor. As such, the
B plaintiff alleged that the defendant by conduct had waived the defendant rights to rely on the express terms of the contract which limits the price fluctuation clause which apply to only five items.

C **[9]** Thereafter, the plaintiff requested the defendant to provide the necessary assistance caused by the increased costs of construction via letters dated 18 March 2008, 22 June 2008 and 7 November 2008 respectively. The defendant did not respond to these letters.

D **[10]** Subsequently, due to the problem of increasing costs which had affected government projects all over the country, the government issued a circular known as *Surat Pekeliling Perbendaharaan Bil 3 Tahun 2008* ('the SPP 3/2008') in order to ensure that government projects are not affected and can be completed within the schedule.

E

[11] The SPP 3/2008 had also allowed variation in price for six more items ie: (i) premix asphaltic concrete and premix bituminous macadam; (ii) sand; (iii) aggregates and crushed aggregates; (iv) water pipe and sewerage pipe; (v) corrugated steel beam guardrail; and (vi) high yield steel fabric.

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[12] The SPP 3/2008 also allows contractors to apply for extension of time for not more than three months and also the option for mutual termination.

G **[13]** Pursuant to the SPP 3/2008, the plaintiff and the defendant had entered into a supplementary agreement on 1 November 2008 to include the six items under the said circular.

[14] Two extensions of time ('EOT') were granted to the plaintiff totalling
H of 15 months of extension whereby the completion date was extended from 1 December 2009–11 March 2011.

[15] Despite entering the supplementary agreement and being given two EOTs, the plaintiff's progress was still slow and eventually the plaintiff had
I suspended the works from 28 October 2009.

[16] The defendant takes the position that because of the plaintiff's continuing default, the defendant had determined the contract with the plaintiff.

[17] The plaintiff's stand is that its suspension of the works was with reasonable basis and therefore commences arbitration proceedings against the defendant.

[18] The defendant takes the position that the determination was correctly done in accordance with the contract and thus counterclaims for the additional cost incurred to appoint third party contractor to complete the works.

[19] After 15 days of hearing the evidence and presiding over the arbitral proceeding, the arbitrator handed down the award dated 15 July 2016.

THE ARBITRATION PROCEEDINGS AND FINDINGS

[20] The parties have agreed to refer their disputes to arbitration and Tan Sri Dato VC George was appointed the sole arbitrator.

[21] The arbitration proceedings commenced on 8 July 2013. The plaintiff called five witnesses and the defendant called six. The hearing was concluded on 10 January 2014 and after hearing the submission of parties on 18 September 2015, the award was delivered on 15 July 2016.

[22] The learned arbitrator's findings on the issues before him are as follows.

Issue (i): Whether the plaintiff/claimant had in fact suspended all works before completion

[23] The arbitrator finds that based on the evidence the plaintiff had ceased all works by end of October 2009 and had abandoned the site at about that time and was not 'on the path of completion'. In para 22.1 and 22.3, the learned arbitrator held:

> Conclusion
>
> 22.1 Accordingly, it is my finding in respect of this core issue, that, while no doubt the Claimant was hoping that the Government would rescue it from the predicament it had found itself in, the Claimant had in the arbitration, in effect, conceded that because it had exhausted all its resources including all of its reserves due, according to it, 'to the extraordinary cost increase', and because of that, all works at the site were suspended, before completion, as at or about the end of October 2009 when, according to the Claimant (see Nik Mohd Kamel's paragraph 44), only some 32.98% or a third of the works, had been completed.
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> ...
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> 22.3 However, it is my further finding that the Claimant had ceased all works by the end of October 2009 and had abandoned the site at about that time and was not 'on the path of completion' and in any event the Claimant had removed any doubts

there might be such an abandonment, by the removal of all or most of its machinery at site and by demolishing and removing two access bridges by 1.2.2010.

Issue (ii): Whether the plaintiff's/claimant's total suspension of the works was for reasonable causes

[24] The plaintiff contends that the total suspension of the works was for reasonable causes namely:

(a) the respondent's failure to extend the fluctuation of price clause to all materials;

(b) legitimate expectation that the fluctuation of price clause would be extended to all materials; and

(c) legitimate expectation that the contract price would be increased.

[25] With regards to the plaintiff's claim that the defendant has failed to extend the fluctuation of price clause to all materials, the learned arbitrator concludes that even though the defendant has the power to do so, there is nothing in the contract, express or implied, that supports the plaintiff's contention that it was obliged to do so.

[26] On the issue that there was a legitimate expectation that the fluctuation of price clause would be extended to all materials, the learned arbitrator finds that the further certificate of EOT extending the completion by one year was not in respect of delays in the procurement of materials cause by the increases of prices. Thus, the learned arbitrator finds that:

... I fail to see any nexus between the EOT and the Fluctuation of Prices provision. Illogical, wishful thinking on the part of the Claimant does not have the effect of providing the Claimant with any such legitimate expectations.

[27] On the issue that the plaintiff has a legitimate expectation that the contract price would be increased, the arbitrator makes the following finding of fact:

44.1 A careful scrutiny of these and other relevant exchange of communications and of the contents of the numerous minutes of site meetings and the contents of the letters and memoranda of the Respondent to the Claimant in respect of delays, fail to provide any basis for the Claimant to effectively say that it was led to believe that it had a legitimate expectation that the Contract Price would be increased.

...

44.4 It follows and it my finding that the Claimant did not have any reasonable cause in the context of clause 51(a)(i) or at all, to legitimately suspend, to legitimately cease the contractual works, before completion.

Issue (iii): Whether the plaintiff/claimant was forced into accepting the terms of the contract and coerced into entering into the supplementary agreement

[28] On this issue, the plaintiff's/claimant's contentions are rejected by the learned arbitrator. For the contract, the arbitrator finds that the claimant had freely submitted its tender. For SPP3/2008, the arbitrator finds that there was no evidence of even any protest or declaration that the supplementary agreement was entered on a without prejudice basis and there was no evidence even remotely suggesting coercion.

Issue (iv): The plaintiff's/claimant's contention that SPP3/2008 does not apply to the contract and that the claimant was entitled to an increase of the price of petroleum based products

[29] On this issue, the learned arbitrator made the following findings:

> 47.4 As to whether SPP3/2008 applies to the Contract, it seems to me that neither SPP 3/2008 nor any provision in the Contract forced the Claimant to avail itself of what SPP 3/2008 purports to make available to all Construction Contractors with contracts with the Government. Clearly it was entirely up to the Claimant to opt to avail itself of what was offered by SPP 3/2008.
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> 47.5 It is also my finding that there is no provision in the Contract, express or implied, to the effect that the Claimant is entitled to an increase of the price of petroleum based products.

Issue (v): Whether the defendant/respondent and/or its agents or servants conspired and/or acted malafide, unconscionably and/or acted negligently when they proceed to terminate the agreement?

[30] On this issue, the arbitrator had considered the evidence and finds that the defendant's action in issuing the two notices and thereafter determining the plaintiff's employment were made well after the plaintiff had abandoned the works. The arbitrator finds that there is no evidence to support the plaintiff's averments and that 'They are without merit and appear to have been somewhat wildly made and have to be and are rejected'.

Issue (vi): Utilisation of the performance bond

[31] The arbitrator finds that the utilization of the performance bond is not tied to the determination of the contractor's employment. The plaintiff had abandoned the works in late October 2009 and the amount due for LAD alone is significantly more than the amount of the performance bond. Thus, the plaintiff's complaint that the utilization of the performance bond is wrongful is rejected by the learned arbitrator.

Issue (vii): Whether the determination of the plaintiff's/claimant's employment is in accordance with cl 51 of the conditions of contract

[32] The arbitrator finds that the omission in the default notice to specifically say that the default was the 'suspension without reasonable cause' makes the default notice invalid and thus the determination of the plaintiff's employment is invalid.

Issue (viii): The plaintiff's/claimant's claim for damages

[33] On this issue, the arbitrator has considered that the plaintiff's claim for damages is based on the alleged breaches of contract on the part of the respondent, inter alia, in not extending the fluctuation of price clause to all essential materials and/or in not increasing the contract price and/or that the determination of the claimant's employment was mala fide and was consequent to a conspiracy by the respondent and/or its servants and agents.

[34] On these claims, the arbitrator made the following findings:

> 72. However, I have made a finding that those and all other allegations of breaches of the Contract by the Respondent and of the allegations of mala fide and conspiracy are without merit.
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> 73.1 As the Respondent was not obliged to extend the Fluctuation of Price clause beyond those materials included in the SPP and was not obliged to increase the contract price, if the Claimant had, on the basis of the old Contract price and without the extension of the Fluctuation of Price clause, resumed the works to completion, going by the Claimant's averments at paragraph 48 of the Points of Claim, and paragraph 45 of CW1's Witness Statement, it would have had to do so by incurring heavy losses.
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> ...
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> 73.3 It had been earlier noted in paragraph 21.3 to 21.5 hereof, that the Claimant itself had in the course of the arbitration admitted that it had completely run out of steam in that even its capital reserves had been completely depleted.
>
> 73.4 Particularly as it has been found that the predicament that the Claimant found itself in cannot be attributed to the Respondent, the Claimant has to live with the losses it had suffered, and would have suffered if it had continued with the Works. The losses alleged to have been suffered by the Claimant perhaps could be because the Claimant had under-tendered and/or failed to allow for the possibility of the fluctuation of the price of essential materials, and so on, but importantly nothing in the evidence has the effect of attributing to any acts and/or omission of the Respondent, for such losses.
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> 73.5 The Claimant's claim has to be dismissed.

Issue (ix): The defendant's/respondent's counterclaim

[35] The defendant's counterclaim is for damages as it had to employ another contractor to complete the works left uncompleted by the plaintiff. For the said extra costs, the defendant now counterclaim for RM66,498,481.82 from the plaintiff.

[36] However, since it was found that the determination of the contract is not valid, the arbitrator held that the defendant is not entitled to the counterclaim.

Issue (x): Conclusion of the award

[37] In para 80 under conclusion, the learned arbitrator finds as follows:

> In the face of the aforesaid impasse, ie of the Claimant failing to substantiate the cause of action it has relied on in prosecuting its claim, and the Respondent having failed to effectively terminate the employment of the Contractor Claimant but had however retaken possession of the site and engaged a Completion Contractor, I am of the view that the justice of the case calls for me to make an Award in respect of the losses claimed by each the Claimant and the Respondent, on the basis that the losses suffered by both parties should lie where they fell.

Issue (xi): The award

[38] The arbitrator then issued the award, order and declare as follows:

(a) that the plaintiff's claim and the defendant's counterclaim are dismissed;

(b) each party will bear its own costs as well as its share of the costs of the arbitration; and

(c) save as aforesaid, any and all other claims of the parties in this arbitration are dismissed.

THE FINDINGS OF THE COURT

[39] The powers and jurisdiction of the courts to interfere with an award is derived from s 42(1) and (1A) of the Arbitration Act 2005 ('Act 646'), which provides:

> 42(1) Any party may refer to the High Court any question of law arising out of an award.
>
> (1A) The High Court shall dismiss a reference made under subsection (1) unless the questions of law substantially affects the rights of one or more of the parties.

[40] In order to succeed in a s 42 application, the plaintiff must satisfy three criteria, namely:

(a) there must be a question of law;

(b) the question must be one which arises out of an arbitral award; and

(c) it substantially affects the rights of one or more of the parties.

[41] Subsection 42(2) provides that a reference under sub-s 42(1) 'shall identify the question of law to be determined and state the grounds on which the reference is sought'.

[42] Subsection 42(4) allows the court, upon the determination of a reference, to confirm, vary, set aside the award or remit the same for reconsideration by the arbitrator.

[43] What amounts to a question of law arising out of the award has been discussed in Sundra Rajoo and WSW Davidson's *The Arbitration Act 2005 — UNICITRAL Model Law as applied in Malaysia* (Sweet & Maxwell Asia) 2007 at pp 198–201 as follows:

> What is a question of law?
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> 42.4 It must be emphasised that the question must be one of law not fact. *It has long been accepted that in arbitration, the tribunal's findings of fact are conclusive*. See the following passage from *Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215 at p 228, an English Court of Appeal decision quoted in Russell on Arbitration (1997), paragraph 8–057:
>
> > *The arbitrators are the masters of the facts*. On an appeal the Court must decide any questions of law arising from the award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings of fact to be right or wrong. *It also does not matter how obvious a mistake by the arbitrators on issues of fact might be* or what the scale of the financial correspondences of the mistake of fact might be.
>
> We take this opportunity to state our view that this basic principle still holds good for the future and that there is nothing in the terms of the Act that suggests the court has any wider jurisdiction to deal with the issues of fact than has existed in the past. It is essential therefore to understand the basic difference which exists between appeals in the court system from subordinate courts, where issues of 'weight of evidence' are routinely addressed, and *references under* section 42 *of the Act, where the court has no jurisdiction to entertain arguement based on weight of evidence.*
>
> 42.5 This is however still not an end of the matter, because the divide between an issue and an issue of law is not always clear or easy to define. Russell on Arbitration (1997), paragraph 8–057, after quoting the passage from Georgas SA (see 42.4 above) adds his own comments:
>
> > *The parties will not have allowed to circumvent the rule that the tribunal's findings*

of fact are conclusive or that they constitute a serious irregularity or an excess of jurisdiction, or on the basis that there was insufficient evidence to support the findings in question. The arguement that it is a question of law whether there is a material to support a finding of fact is no longer available.

Mustill and Boyd (1989) at p 596 goes further to state that even a contention that findings of primary or secondary fact were arrived at without any evidence cannot be entertained as a question of law. (Emphasis added.)

[44] The Court of Appeal in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 has also provided some governing principles on s 42 of Act 646 as follows:

Some Governing Principles under s 42

[57] On the present case-authorities, a number of propositions can be stated as guidelines. We enumerate these below, without intending them to be exhaustive, since clearly the law has to be developed further.

(a) the question of law must be identified with sufficient precision (*Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; *Maimunah Deraman v Majlis Perbandaran Kemaman;*

(b) the grounds in support must also be stated on the same basis;

(c) the question of law must arise from the award, not the arbitration proceeding generally (*Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd*, *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd*);

(d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) the question of law must be a legitimate question of law, and not a question of fact 'dressed up' as a question of law (*Georges SA v Trammo Gas Ltd (The Belarus)* [1993] 1 Lloyd's Rep 215);

(f) the court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties (*Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd*);

(g) this jurisdiction under s 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98; [2013] 8 CLJ 655);

(h) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence (*Gold and Resource Developments (NZ) Ltd v Doug Hood Limited* [2000] 3 NZLR 318); and

(j) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[45] However, subsequently the Federal Court in the case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 held that the guidelines (g), (h) and (j) stated in *Perwira Bintang* are not in line with s 42 and should not be followed. The Federal Court held that under s 42, the only ground for the court to intervene is whether there is a question of law arising out of the award that substantially affects the rights of the parties.

[46] Guided by the above principles, I will now deal with the application.

Question (i)

[47] Question (i) is very wide, but in the plaintiff's written submission, the plaintiff takes the issue that since the arbitrator has decided that the defendant is not entitled to any damages in the counterclaim, then the defendant is also not entitled to retain the monies pursuant to the performance bond (see paras 102–105 of the plaintiff's written submission — ('PWS'))

[48] In *Tai Wah Construction Co v Government Of Malaysia (Jabatan Kerja Raya Sarawak)* [2005] 2 MLJ 442; [2004] 3 CLJ 489, the appellant's complaints against the finding of the arbitrator are as follows:

(a) that the determination of the contract was not lawful under the conditions of the contract or at common law in the circumstances of the facts of the appeal; and

(b) that the appellant was not entitled to the said sum as indemnity on the performance bond.

[49] In the award, in *Tai Wah Construction* case the arbitrator has decided that the determination of the contract was not lawful. The arbitrator had allowed part of the appellant's claim for work done but decided that the appellant was not entitled to indemnity on the performance bond, costs, loss of profit, damages and price variation. One of the contentions of the appellant's counsel is that the respondent was not entitled to call on the performance bond since they were in breach of the contract. The Court of Appeal held that it was for the appellant to show on the face of the award what moved the arbitrator to reach the decision that it was not entitled to the proceeds of the bond. However, since the appellant failed to show this and thus the decision of the High Court is maintained. At p 500, the court held:

... What is a performance bond? In his book entitled 'Law of Banking' (2nd Ed), at p 824, Poh Chu Chai was of the view that it is 'essentially a guarantee given by a bank, on behalf of customers to a third party, that the customer would duly carry out his contract with the third party.

...

In *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517; [1996] 3 CLJ 163 Mohammed Dzaiddin FCJ (as he then was) said:

> A bank guarantee is a performance bond. There are two types of performance bond. The first type is a conditional bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second type is an unconditional or 'on demand' performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract.

In his book, referred to above, Poh Chu Chai said (at p 827):

> A bank giving a performance guarantee is in no way concerned with the underlying contract on which the performance guarantee may be based. A bank is in no way affected by any dispute between its customer and the beneficiary of the performance guarantee over their underlying contract. In *R D Harbottle (Mercantile) Ltd and another v National Westminster Bank Ltd and others* [1977] 2 All ER 862, it was decided, inter alia, by Kerr J that a dispute between a customer and the beneficiary of a performance guarantee over their contractual rights should not be allowed to interfere with a bank's payment obligations under the performance guarantee.

We have not sighted the performance bond referred to in the instant case and hence were not in a position to see the terms and conditions set out therein. Was it a conditional bond or an unconditional or 'on demand' bond? It would seem that the said performance bond was an unconditional or 'on demand' on the basis that the facts denote that the respondent made a call on the bond and had received the proceeds. *The arbitrator found that the appellant had not proved that it was entitled to the proceeds of the bond*. Nanyang Insurance Co issued the bond in favour of the respondent on the instructions of the appellant. The respondent had made a call on the bond and Nanyang Insurance Co, which is not in any way concerned with any dispute between the parties, was obliged to release the proceeds to the respondent as beneficiary. The facts showed there was delay on the part of the appellant in its endeavor to complete the works. *It is for the appellant to show to the court, on the face of the award, what moved the arbitrator to reach the decision that it was not entitled to the proceeds of the bond. This would be the determining consideration with regard to the use of discretion by the court. Having failed to show that to the court, we cannot find anything erroneous with the learned judge's use of discretion not to remit the award to the reconsideration of the arbitrator*. (Emphasis added.)

[50] The factual matrix in *Tai Wah Construction* case is similar to the present

A case in that the arbitrator ruled that the plaintiff was not entitled to the performance bond although the termination was held to be unlawful. Therefore, even though the termination is not lawful, it does not mean that the plaintiff is entitled to the performance bond or the proceeds thereof. The plaintiff must establish how it is entitled to the proceeds of the bond.

B

[51] In the present case, the plaintiff did not show how it is entitled to the proceeds of the performance bond but merely submit that just because the respondent failed in its counterclaim for damages, then it is also not entitled to the performance bond.

C

[52] With regards to the performance bond, in the award, the arbitrator had looked at cl 37 of the contract in respect of the performance bond, and the relevant cl 37(c) reads as follows:

D

> If a Contractor fails to execute the Contract or commits any breach under the Contract, the Government or S.O ... may utilize and make payments out of ... the said Performance Bond ... in accordance with the terms of this Contract.

E

[53] Having considered cll 37 and 40 on liquidated and ascertained damages ('LAD'), the arbitrator finds that the utilisation of the performance bond is not tied to the determination of the plaintiff's employment. The arbitrator also found that the plaintiff had abandoned the works in late October 2009 and the amount due for LAD alone is significantly more than the amount of the

F

performance bond. Thus, the arbitrator finds that the defendant's right to the proceeds of the performance bond is not related to the termination but to losses suffered by the defendant and/or amounts due to the defendant arising from the breach or breaches of the contract by the plaintiff.

G

[54] Having considered the award, I am of the considered opinion that the arbitrator has given his reasons as to why the utilisation of the performance bond is not wrongful and thus, his findings should not be disturbed.

H

[55] Added to that, the plaintiff had also challenged the defendant's call on the performance bond and the plaintiff's claim have been dismissed by the court. In *Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu)* [2011] 2 MLJ 400, the plaintiff's claim for an injunction to restrain JKR from claiming under the performance bond

I

was dismissed by the court where the court held that the defendant had the right to call for the bank guarantee.

[56] As such, I do not find any error of law in the interpretation and the findings of the learned arbitrator.

[57] With regards to the issue of damages, the plaintiff's claim for damages is premised on the defendant's alleged breaches of contract, inter alia, in not extending the fluctuation of price clause to all essential materials and/or in not increasing the contract price and/or that the determination of the plaintiff's employment was mala fide and was consequent to a conspiracy by the respondent and/or its servants and agents.

[58] On these claims, the arbitrator has made a finding that the plaintiff has failed to establish the said breaches of the contract, upon which the claim for damages are based upon. The arbitrator also find that the 'predicament that the Claimant found itself in cannot be attributed to the Respondent, the Claimant has to live with the losses it had suffered, and would have suffered if it had continued with the Works. The losses alleged to have been suffered by the Claimant perhaps could be because the Claimant had under-tendered and/or failed to allow for the possibility of the fluctuation of the price of essential materials, and so on, but importantly nothing in the evidence has the effect of attributing to any acts and/or omission of the Respondent, for such losses'.

[59] These are findings of facts by the arbitrator, and that the plaintiff is not entitled to damages as the plaintiff has failed to establish that the defendant has breached the contract on the pleaded grounds. The arbitrator also find that the plaintiff had abandoned the site before the termination of the contract.

Question (ii)

[60] It is the submission of the plaintiff that the arbitrator, in arriving at his conclusion that the demand on the performance bond was not linked to the termination of the contract but to the delay of the progress of the works, the arbitrator was of the view that the defendant would be entitled to impose LAD. The plaintiff then contends that the defendant's entitlement to the LAD was not a pleaded issue.

[61] This question is clearly misleading as the learned arbitrator did not impose any LAD on the plaintiff.

[62] I agree with the learned senior federal counsel that the reference to LAD in determining the utilisation of the performance bond does not mean that the arbitrator had imposed LAD on the plaintiff, but had merely provided a comparison to show that if the defendant did claim for LAD, the amount due to the defendant will be more than the amount of the performance bond. Therefore, this question does not arise from the award.

Question (iii)

[63] In para 113 of PWS, the plaintiff simply submits that 'it is clear that the plaintiff will be entitled to damages as a result of the wrongful termination of the contract by the defendant'.

[64] However, I agree with the defendant that what is the appropriate measure of damages is a finding of facts made by the arbitrator and not a question of law. In the case of *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 MLJ 681, the court held as follows:

> [60] Having considered the respective submissions it was our considered view that the *determination of the quantum of damages by the arbitrator was a determination of fact.* The arbitrator in coming to his determination had addressed his mind to the right principles of law. There was a range of possible measures of damage recognised and available in law open to the arbitrator. The arbitrator had applied the test of what would be a reasonable compensation in all the circumstances of the matter considering the particular complexity attached to this case, namely the fact that technology inherent in the TOP plant exclusively belonged to the appellant and rectification or replacement would prove to be difficult and costly. (Emphasis added.)

[65] Added to that, the learned arbitrator has applied his mind and considered the facts of the case, the evidences put forward by the parties through their respective witnesses and the documents filed and parties' submissions. The arbitrator has made a finding that the plaintiff did not have any reasonable reasons for suspending the works at site and the losses alleged to be suffered by the plaintiff cannot be attributed by any acts and/or omissions of the defendant.

[66] In the premise, I am of the considered opinion that these are findings of facts which should not be disturbed by this court.

Questions (iv) and (v)

[67] In para 114 of PWS, the plaintiff submits that the 'actions of the defendant prevented the plaintiff from carrying out and completing their works. This is in breach of s 54 of the Contracts Act 1950 and thus the plaintiff is entitled to the damages that it has claimed. The reality of the matter is that the plaintiff was prevented by the defendant by its decisions to increase the costs of fuel and oil and these actions had a direct impact on the ability of the plaintiff to progress with the works'.

[68] The above questions (iv) and (v) relates to the plaintiff's allegation that its suspension of works was for reasonable causes namely:

(a) the defendant's failure to extend the fluctuation of price clause to all materials;

(b) the legitimate expectation that the fluctuation of price clause would be extended to all materials; and

(c) the legitimate expectation that the contract price would be increased.

[69] The learned arbitrator had looked at these allegations and finds that there is no evidence to support the plaintiff's contentions. These are all findings of facts by the arbitrator which this court will not disturb.

[70] The arbitrator also find that based on the evidence, the plaintiff had ceased all works by end of October 2009 and had effectively abandoned the site by removing all or most of its machinery at the site and removed the two) access bridges by 1 February 2010.

Questions (vi), (vii) and (viii)

[71] Since the plaintiff did not submit on these questions, they are deemed to have been abandoned.

[72] The above issues are on implied terms. This issue was dealt with by the arbitrator in paras 25–35.8.8 of the award where he had considered the plaintiff's contention that it was an implied term of the contract that all the price of materials would be adjusted if it is found that there is a need to make adjustments and the defendant had been in breach of contract by not doing so.

[73] The learned arbitrator finds that based on the plaintiff's testimony, even at the time of tender, the parties were aware that there could be an increase in the price of essential materials. This contingency was anticipated and had been addressed and duly dealt with, on agreed terms as can be seen in the fluctuation of price clause and its appendix. The arbitrator then held that even though the defendant had the power to extend the fluctuation of price clause to other materials, there is nothing, express or implied, that supports that plaintiff's contention that the defendant is obliged to do so. In making such a finding the learned arbitrator has referred to the Federal Court decision of *Sababumi (Sandakan Sdn Bhd) v Datuk Yap Pak Leong* [1998] 3 MLJ 151 and *Chitty on Contracts* on the law on implied terms. Therefore, the arbitrator had applied his mind to the relevant facts, documents and law before arriving to his decision and his decision on implied terms should not be challenged. The plaintiff has failed to show in what manner the learned arbitrator has made an error in the application of the law on implied terms.

Questions (ix) and (x)

[74] The arbitrator's discussion and conclusion on the plaintiff's claim for damages can be found at paras 71–73.5 of the award. The plaintiff's allegation that the arbitrator has reached a conclusion based on assumption is based on para 73.1, which reads:

> As the Respondent was not obliged to extend the Fluctuation of Price clause beyond those materials included in the SPP and was not obliged to increase the contract price, if the Claimant had, on the basis of the old Contract price and without the extension of the Fluctuation of Price clause, resumed the works to completion, *going by the Claimant's averments at paragraph 48 of the Points of Claim, and paragraph 45 of CW1's Witness Statement, it would have had to do so by incurring heavy losses*. (Emphasis added.)

[75] However, I find that the learned arbitrator had considered the plaintiff's position based on the witness ('CW1') testimony in para 45 of his witness statement and the fact pleaded in para 48 of the points of claim as to the cost over-run suffered by the plaintiff. The learned arbitrator had considered the plaintiff's position that based on these facts, if the plaintiff is to continue with the works without the fluctuation of price clause being extended and without any increase to the contract price, the plaintiff would incur heavy losses. These are findings of facts by the arbitrator which are not questions of law.

Question (xi)

[76] Before the plaintiff can rely on the doctrine of estoppel and/or legitimate expectation, the onus is on the plaintiff to establish that the defendant has made representations that the plaintiff can relied upon. However, it is the finding of the arbitrator that there is no basis for the plaintiff to say that it was led to believe that it had a legitimate expectation that the contract price will be increased. This finding has been made by the arbitrator upon careful scrutiny of the alleged meetings and letters relied by the plaintiff and other relevant exchange of communications, the numerous minutes of site meetings, the contents of the letters and memoranda in respect of delays. These are findings of facts which this court cannot disturb, and with these findings of facts there is no basis to invoke the doctrine of estoppel and/or legitimate expectation.

Question (xii)

[77] The plaintiff did not submit on this question as it is the clearly the duty of the arbitrator to assess all the evidence before him.

Question (xiii)

[78] The plaintiff did not submit on this question as the award clearly shows that the learned arbitrator has decided the issues raised with solid legal reasoning.

CONCLUSION

[79] Premised on the reasons enumerated above, I am of the considered opinion that the plaintiff's complaint is primarily based a finding of fact by the arbitrator. I am of the considered opinion that the learned arbitrator has carefully evaluated the evidence and applied the correct principles of law in his findings. As such, there are no questions of law that requires the intervention of this court under s 42 of the Arbitration Act 2005. The originating summons is therefore dismissed with costs.

Application dismissed with costs.

Reported by Ahmad Ismail Illman Mohd Razali